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Criminal Procedure—Juveniles: Retroactive Application of In re Gault Denied in Washington—Brumley v. Charles Denny Juvenile Center, 77 Wn.2d 702, 466 P.2d 481 (1970)

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CRIMINAL PROCEDURE—JUVENILES: RETROACTIVE APPLICATION OF *In re* GAULT DENIED IN WASHINGTON—*Brumley v. Charles Denney Juvenile Center*, 77 Wn.2d 702, 466 P.2d 481 (1970).

Genevieve Fay Brumley was adjudged a delinquent child[1] by the juvenile court of Snohomish County on December 12, 1966 after she admitted telephoning bomb threats to local schools. Present at the adjudicatory hearing were court personnel, her parents, a welfare caseworker, a probation officer, and a policeman. She was not represented by counsel. During her subsequent incarceration,[2] the United States Supreme Court extended the right to counsel to juvenile proceedings in *In re Gault*.[3] In August of 1968, Miss Brumley petitioned the superior court for a writ of habeas corpus, contending that the *Gault* decision required a reversal of her conviction. The petition was denied. The Washington State Supreme Court affirmed. *Held:* The right to counsel extended to juveniles in *In re Gault* will not be applied retroactively in Washington. *Brumley v. Charles Denney Juvenile Center*, 77 Wn.2d 702, 466 P.2d 481 (1970).

I. THE DEVELOPMENT AND SCOPE OF DUE PROCESS IN JUVENILE PROCEEDINGS

Prior to 1899, children in this country above the age of seven were accorded the same constitutional protections and were subjected to the same penalties as adults.[4] A "tidal wave of reform"[5] resulted in the passage of the 1899 Illinois Juvenile Court Act, the first of its kind in the United States.[6] One of the consequences of this reform was the

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1. WASH. REV. CODE § 13.04.010 (1959) provides:
The words "delinquent child" mean any child under the age of eighteen years who violates any law of this state, or any ordinance of any town, city or county of this state defining a crime or who has violated any federal law or law of another state defining a crime. . . .
2. *Id.* § 13.04.095 (1970) provides in part:
When any child shall be found to be delinquent or dependent, within the meaning of this chapter, . . . the court may commit the child:
(6) To the department of institutions if the court finds such child to be delinquent. . . . A child committed to the department of institutions shall be subject to the supervision and control thereof. . . .
3. 387 U.S. 1 (1967).
4. *See* Fortas, *Equal Rights—For Whom?*, 42 N.Y.U.L. REV. 401, 405 (1967).
5. *Id.* at 406.
6. From the Illinois model, the system has spread to every state, the District of Columbia, and Puerto Rico. *Gault*, 387 U.S. at 14.

elimination of many procedural safeguards previously available to juveniles.[7] In 1948, however, the United States Supreme Court, in *Haley v. Ohio*,[8] reversed a first-degree murder conviction because the police had obtained a confession from a fifteen-year-old boy who had been denied the assistance of counsel during interrogation. The Court held that due process includes the right to counsel during the interrogation of juveniles. In *Kent v. United States*,[9] the Court held that, under the fourteenth amendment, the juvenile defendant was entitled to a hearing which measures up to the "essentials of due process and fair treatment," including a full investigation of the child's case, a statement of the juvenile court's reasons for its decision, and the effective assistance of counsel.[10]

Subsequent to the *Kent* decision, the President's Commission on Law Enforcement and Administration of Justice issued a Task Force Report[11] on juvenile delinquency revealing the shocking failures of the juvenile court system. Observing that this system had generally failed to rehabilitate delinquents, stem the tide of youth crime, or bring "justice and compassion to the child offender,"[12] the Commission concluded:[13]

> In theory the court's operations could justifiably be informal, . . . because it would act only in the best interest of the child. In fact it frequently does nothing more nor less than deprive a child of liberty without due process of law—knowing not what else to do and needing, whether admittedly or not, to act in the community's interest even more imperatively than the child's. In theory it was to exercise its protective powers to bring an errant child back into the fold. In fact there is increasing reason to believe that its intervention reinforces the juvenile's unlawful impulses.

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7. *See* Fortas, *supra* note 4, at 406.
8. 332 U.S. 596 (1948).
9. 383 U.S. 541 (1966).
10. *Kent*, 383 U.S. at 546. In *Kent* the juvenile court judge did not hold a hearing, nor did he confer with the petitioner's parents or counsel before he waived jurisdiction and directed that petitioner be tried in federal district court.
11. TASK FORCE REPORT ON JUVENILE DELINQUENCY, PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, JUVENILE DELINQUENCY AND YOUTH CRIME (1967) [hereinafter cited as TASK FORCE REPORT].
12. *Id.* at 7.
13. *Id.* at 9.

The juvenile court system lacked sufficient procedural rules to fulfill effectively the functions for which it had been created.

The United States Supreme Court decided *In re Gault* on May 15, 1967. Fifteen-year-old Gerald Gault had been taken into custody for making lewd and indecent remarks to a woman over the telephone. His parents received no notice of their son's custody, nor were they served with the delinquency petition. At the hearings which followed, the court did not advise Gault of his right to counsel, testimony was not required to be given under oath, and no transcript or record of the proceedings was prepared. The complaining witness was not present at any stage of the adjudicatory process. At the close of the final hearing, Gault was committed as a juvenile delinquent to an industrial school "for the period of his minority [that is, until 21], unless sooner discharged by due process of law."[14]

The Court reversed the dismissal of a petition for a writ of habeas corpus. Examining the difficulties Gault faced in defending himself, Justice Fortas, writing for the majority, concluded:[15]

> The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings and to ascertain whether he has a defense and to prepare it. The child "requires the guiding hand of counsel at every step in the proceedings against him."

The Court also ruled that Gault's questionable admission of guilt and his accuser's absence from the trial had permitted an unreliable adjudication of delinquency and had denied him the "essentials of due process and fair treatment" guaranteed juveniles by the fourteenth amendment. The Court noted that "inadequate and inaccurate findings of fact"[16] frequently result where fundamental requirements of due process are not observed and concluded that due process of law guarantees a juvenile, at the adjudicatory stage of juvenile court proceedings,[17] the assistance of counsel, notice of hearings, the oppor-

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14. *Gault*, 387 U.S. at 7-8. Gault's sentence is shocking when compared to the maximum penalty that could be imposed on an adult who had committed the same offense.

The penalty specified in the Criminal Code, which would apply to an adult, is $5 to $50, or imprisonment for not more than two months.

Id. at 8-9.

15. *Id.* at 36 (footnotes omitted).
16. *Id.* at 19-20.
17. The four stages of juvenile court proceedings are: intake, where the decision

tunity to confront and cross-examine witnesses, and the privilege against self-incrimination.

The Court has recently decided two cases concerning the scope of the due process rights established in *Gault*. *In re Winship*[18] dealt with the proper standard of proof to be applied in delinquency hearings. A twelve-year-old boy had been convicted of theft by a mere preponderance of the evidence and was sentenced to six years in a training school. The conviction was reversed and the Court ruled that "the constitutional safeguard of proof beyond a reasonable doubt is as much required during the adjudicatory stage of a delinquency proceeding as are those safeguards applied in Gault."[19] In observing that accurate findings of fact are required by the due process clause, the Court viewed the reasonable doubt standard as a "prime instrument for reducing the risk of convictions resting on factual error."[20] In *McKeiver v. Pennsylvania*[21] the Court faced the question of a juvenile's right to trial by jury. Holding that due process for juvenile defendants does not include this right, the Court explained:[22]

> [T]he applicable due process standard in juvenile proceedings, as developed by *Gault* and *Winship*, is fundamental fairness. . . . But one cannot say that in our legal system the jury is a necessary component of accurate factfinding.

In determining what due process guarantees are to be extended to juveniles, the Court has consistently reasoned that only those which tend to enhance the reliability of the fact-finding process will be applied to juvenile proceedings. The argument made in the following section is that this same criterion should be, and has been, the central issue in retroactivity determinations. Had the *Brumley* court given the

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is made whether to detain the juvenile; waiver, where the decision is made to retain or decline jurisdiction; adjudication, where the determination of guilt or innocence is made; and disposition, which is analogous to sentencing in the trial of an adult. Comment, *The Juvenile Court Revolution in Washington*, 44 WASH. L. REV. 421, 428 (1969).

18. 397 U.S. 358 (1970). For a further discussion of *In re Winship* see Cohen, *The Standard of Proof in Juvenile Proceedings: Gault Beyond a Reasonable Doubt*, 68 MICH. L. REV. 567 (1970); 39 FORDHAM L. REV. 121 (1970).

19. *Winship*, 397 U.S. at 368.

20. *Id.* at 363.

21. 91 S.Ct. 1976 (1971).

22. *Id.* at 1985.

reliability factor the weight it has received from the United States Supreme Court, an opposite result would have been reached.

II. RETROACTIVE APPLICATION OF *IN RE GAULT* DENIED

In re Lesperance[23] was the first post-*Gault* case to reach the Washington Supreme Court in which a juvenile alleged denial of the assistance of counsel. After she had been adjudged a delinquent child, defendant Lesperance retained counsel to review the delinquency hearing. The court ruled that because of *Gault,* which had been decided after the delinquency hearing but while the appeal was pending, the judgment of the juvenile court must be reversed for failure to apprise the juvenile of her right to counsel in the adjudicatory stage of the proceedings. Since the juvenile court's decision had been rendered prior to *In re Gault,*[24] the *Lesperance* court appeared to have applied *Gault* retroactively. However, the appeal postponed the finalization of the conviction beyond the date of the *Gault* decision.[25] Therefore, application of the right to counsel in *Lesperance* was not truly retroactive.

The principal case clearly presents the retroactivity question. Miss Brumley had not retained an attorney for the delinquency hearing and she did not appeal the juvenile court's decision. Her attorney retained *after* the delinquency hearing, sought the post-conviction remedy of habeas corpus. Thus, her release was contingent upon a determination of whether the *Gault* right to counsel should be applied retroactively

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23. 72 Wn.2d 572, 434 P.2d 602 (1967).

24. The hearing was held on April 14, 1967; the *Gault* decision was rendered on May 15, 1967.

25. The appeal was decided November 24, 1967.

> Miss Lesperance's proceeding had not been finalized when *Gault* was announced. Rather, it was before this court on direct review at that time. While the statutes dealing with juvenile delinquency and dependency proceedings do not, with one exception not pertinent here, specifically provide for an appeal, appellate review by certiorari is granted as a matter of course if a petition is timely filed. Miss Lesperance and her parents pursued such a course. In the present proceeding, neither appellant nor her parents sought such a review. Appellant's delinquency adjudication, insofar as direct review be concerned, then, became final before the *Gault* rules were proclaimed. We do not, therefore, regard *Lesperance* as dispositive of the question as to whether the pertinent *Gault* rule is wholly retroactive.

Brumley, 77 Wn.2d at 704-05, 466 P.2d at 483.

to juveniles whose convictions had been finalized[26] prior to *Gault*. The *Brumley* court conceded that four out of five states have held *Gault* retroactively applicable to adjudicatory hearings.[27] Nevertheless, the court denied retroactive application of *Gault* in Washington:[28]

> [T]hough *Gault's* right to counsel rule is intended to enhance the reliability and integrity of the fact-finding process . . . retroactive application of that rule now would not, on balance, significantly further its basic objectives. . . .

The *Brumley* court prefaced its discussion of retroactivity with a reference to the problem of implementing new procedural rules. The court emphasized that application of *Miranda v. Arizona*[29] was held to be prospective only and concluded that, because *Gault* was "more far reaching and revolutionary"[30] than *Miranda, Gault* should likewise receive only prospective application. Better analogies, however, would have been *Gideon v. Wainwright*,[31] in which the United States Supreme Court held that the right to counsel in criminal trials is required by the sixth and fourteenth amendments, and *Doughty v. Maxwell*,[32] in which the Court applied *Gideon* retroactively. *Gault* merely extended the *Gideon* rule to cases involving juveniles.

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26. Both Miss Lesperance and Miss Brumley were tried prior to the *Gault* decision. After her conviction Miss Lesperance had retained counsel familiar with the method of appealing a juvenile court decision. Although there is no statutory authority for appeal, a writ of certiorari is customarily granted. Due to this fortunate circumstance, Miss Lesperance received the constitutional benefits of *Gault*. Uninformed concerning the benefits of counsel, and being personally unfamiliar with the grounds and procedure for appeal, Miss Brumley allowed the juvenile court's ruling to become finalized. With no appeal pending when *Gault* was decided, Brumley could not receive any constitutional guarantee. She was complaining because she had been denied counsel and only counsel could have preserved her eligibility for the benefits of *Gault*.

27. [T]he following state courts have held *Gault* retrospectively applicable to adjudicatory hearings. . . . *Application of Billie*, 103 Ariz. 16, 436 P.2d 130 (1968); *Marsden v. Commonwealth*, 227 N.E.2d 1 (Mass. 1967); *State in re J. M.*, 103 N.J. Super. 88, 246 A.2d 536 (1968); *State ex rel. LaFollette v. Circuit Court*, 37 Wis. 2d 329, 155 N.W.2d 141 (1967).

77 Wn.2d at 705, 466 P.2d at 483. The Washington court cited two Florida state appellate decisions for the proposition that *Gault* should be applied only prospectively, but noted parenthetically that a Florida Supreme Court decision, State v. Steinhauer, 216 So. 2d 214 (Fla. 1968), implicitly discredits the two court of appeals holdings. *Id.* at 705-06, 466 P.2d at 483.

28. *Id.* at 708-09, 466 P.2d at 484.

29. 384 U.S. 436 (1966).

30. *Brumley*, 77 Wn.2d at 706, 466 P.2d at 483.

31. 372 U.S. 335 (1963).

32. 376 U.S. 202 (1964) (per curium).

Applied retroactively, as *Gideon* was, the decision required re-trial and releases

The *Brumley* court perceived a qualitative difference between the role of defense counsel at a criminal trial and at a juvenile delinquency hearing. The latter, the court suggested, lacks the "technical intricacies of a criminal trial;"[33] the juvenile court is "more concerned with the correction of an erring child than with engaging in an adversary contest."[34] However, often a prosecution is aimed at conviction rather than at a fair and accurate determination of guilt or innocence. By discouraging any adversary quality in delinquency hearings, the *Brumley* court has frustrated the effective assistance of counsel. In considering the court's distinction between the technical intricacies of adult and juvenile trials, emphasis should be given to the conclusion of the President's Commission on Law Enforcement and Administration of Justice:[35]

> The most informal and well-intentioned judicial proceedings are technical; few adults without legal training can influence or even understand them; certainly children cannot. Papers are drawn and charges expressed in legal language. Events follow one another in a manner that appears arbitrary and confusing to the uninitiated. Decisions, unexplained, appear too official to challenge.

The juvenile may have greater need for counsel than his usually more experienced adult counterpart. At stake is the risk that an innocent juvenile may be incarcerated and exposed to the dehumanizing prison environment.

The court in *Brumley* summarized the method of determining whether a new constitutional rule of procedure should be applied retroactively.[36]

> Three factors are deemed relevant. . . . (1) The purpose of the new rule and whether retroactive application of the rule would effectively serve that purpose; (2) . . . to what extent law enforcement agencies,

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from prison unparalleled in American history. As to the future, it meant that five states had to take immediate action to provide counsel where they had not previously provided it. No excuses about inadequate resources or about the absence of enabling legislation would be accepted.

Haddad, *"Retroactivity Should Be Rethought": A Call For the End of the Linkletter Doctrine*, 60 J. CRIM. L.C. & P.S. 417, 422-23 (1969).

33. *Brumley*, 77 Wn.2d at 706, 466 P.2d at 483.
34. *Id.*
35. TASK FORCE REPORT, *supra* note 11, at 32.
36. *Brumley*, 77 Wn.2d at 707, 466 P.2d at 483. The court simply paraphrased the three-part test set out in Stovall v. Denno, 388 U.S. 293, 297 (1967).

including courts, justifiably relied upon the pre-existing rule; and (3) the effect of retroactive application upon the administration of justice.

Each factor is considered separately and "the process is one of balancing each against the other."[37] A careful analysis of this formula dictates retroactivity where the new rule protects or increases the reliability of the fact-finding process. Only where this criterion is not met should consideration be given to the additional factors of reliance and of the effect retroactivity would have upon the administration of justice.[38] The United States Supreme Court has never denied retroactive application to a new rule which affects the reliability of the fact-finding process.[39] On the other hand, rules which do not enhance the accuracy of factual determination are generally applied only prospectively.[40] This consistency in the case law would appear to compel

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37. *Brumley*, 77 Wn.2d at 707, 466 P.2d at 484.

38. If the new rule has a profound effect on the reliability of the fact-finding process, then that rule will most probably be retroactive; if the new rule has some, but less than a profound effect on trial reliability, then the criteria of reliance by the authorities on the old rule and the effect upon the administration of justice of a retroactive application of the new rule will be applied to determine whether the new rule will be declared retroactive.
Comment, *Retroactivity: A New Look at the Reliability Test*, 21 SYRACUSE L. REV. 993, 996-97 (1970).

39. The following decisions held new constitutional rules affecting criminal trials retroactive: Eskridge v. Washington, 357 U.S. 214 (1958) (per curiam), confirming the retroactivity of Griffin v. Illinois, 351 U.S. 12 (1956) (right to transcript on appeal); Doughty v. Maxwell, 376 U.S. 202 (1964) (per curiam), confirming the retroactivity of Gideon v. Wainwright, 372 U.S. 335 (1963) (right to trial counsel); McNerlin v. Denno, 378 U.S. 575 (1964), confirming the retroactivity of Jackson v. Denno, 378 U.S. 368 (1964) (due process violated where defendant convicted upon involuntary confession); Lyles v. Beto, 379 U.S. 648 (1965) (per curiam), confirming the retroactivity of Massiah v. United States, 377 U.S. 201 (1964) (incriminating words of defendant, made after indictment and in absence of counsel, are inadmissible); Roberts v. Russell, 392 U.S. 293 (1968) (per curiam), holding Bruton v. United States, 391 U.S. 123 (1968) (defendant's confession implicating co-defendant at a joint trial held inadmissible), retroactive; McConnell v. Rhay, 393 U.S. 2 (1968) (per curiam) holding retroactive Mempa v. Rhay, 389 U.S. 128 (1967) (right to counsel at sentencing and probation revocation hearing); Witherspoon v. Illinois, 391 U.S. 510, 523 n.22 (1968) (jurors can't be excluded upon basis of opposition to death penalty) holding its own rule retroactive; Arsenault v. Massachusetts, 393 U.S. 5 (1968) (per curiam), holding White v. Maryland, 373 U.S. 59 (1963) retroactive and confirming the retroactivity of Hamilton v. Alabama, 368 U.S. 52 (1961) (both cases: right to counsel at arraignment) as well as Douglas v. California, 372 U.S. 353 (1963) (right to counsel on appeal); Berger v. California, 393 U.S. 314 (1969) (per curiam), holding Barber v. Page, 390 U.S. 719 (1968) (right to confrontation), retroactive; Ashe v. Swenson, 397 U.S. 436, 437 n.1 (1970), confirming the retroactivity of Benton v. Maryland, 395 U.S. 784 (1969) (double-jeopardy).

40. The following cases held new constitutional decisions prospective in application: Linkletter v. Walker, 381 U.S. 618 (1965), holding prospective Mapp v. Ohio,

retroactivity in *Brumley* because, as determined in *Gideon v. Wainwright,* the constitutional right to counsel directly affects the reliability of the fact-finding process.

The *Brumley* court determined *Gault's* main objective was "to insure, as far as possible, that a delinquency adjudicatory proceeding would constitute a fair and judicious examination of the facts bearing upon the particular issue of delinquency and lead to an accurate and just determination."[41] This purpose, the court reasoned, would not be effectuated by retroactive application of *Gault* for two reasons. First, "it can be safely observed that the vast majority of juvenile proceedings carried out before *Gault* were fair and compassionate, resulted in accurate factual determinations . . . and concluded with appropriate remedial dispositions."[42] This confidence in the just outcome of pre-*Gault* determinations is not shared by the United States Supreme Court. The Court noted in *Gault* that the[43]

> [f]ailure to observe the fundamental requirements of due process has resulted in instances, which might have been avoided, of unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy.

The second reason was that the reprocessing of juvenile cases "would add little to the social and psychological attitude of the individual involved. . . ."[44] It seems inconceivable that the court would fail to recognize the positive effect of a retrial upon the attitudes (including

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367 U.S. 643 (1961) (guarantee against unreasonable search and seizure); Tehan v. Shott, 382 U.S. 406 (1966), holding prospective Griffin v. California, 380 U.S. 609 (1965) (non-neutral judicial and prosecutorial comment upon defendant's decision not to testify forbidden); Johnson v. New Jersey, 384 U.S. 719 (1966), holding prospective both Escobedo v. Illinois, 378 U.S. 478 (1964) (right to counsel during interrogation) and Miranda v. Arizona, 384 U.S. 436 (1966) (suspect must be warned of right to counsel, right to remain silent and consequences of speaking where he is in custody and police efforts have shifted from investigatory to accusatory); Stovall v. Denno, 388 U.S. 293 (1967), holding United States v. Wade, 388 U.S. 218 (1967) and Gilbert v. California, 388 U.S. 263 (1967) (both cases: right to counsel at line-ups and show-ups) prospective; DeStefano v. Woods, 392 U.S. 631 (1968) (per curiam), holding prospective Duncan v. Louisiana, 391 U.S. 145 (1968) and Bloom v. Illinois, 391 U.S. 194 (1968) (both cases: right to trial by jury); Desist v. United States, 394 U.S. 244 (1969), holding Katz v. United States, 389 U.S. 347 (1967) (right to privacy where expected; search warrant required for "electronic eavesdropping") prospective.

41. 77 Wn.2d at 707, 466 P.2d at 484.
42. *Id.* at 707-08, 466 P.2d at 484.
43. 387 U.S. at 19-20.
44. *Brumley,* 77 Wn.2d at 708, 466 P.2d at 484.

faith in criminal justice) of a wrongly-convicted youth. The court must therefore have assumed that few, if any, convicted juveniles are actually innocent. But this is an argument the United States Supreme Court consistently rejects when deciding questions of retroactivity. Moreover, the continued incarceration of even a guilty youth whose conviction was obtained unconstitutionally is far from certain to have the rehabilitative effect upon the prisoner postulated for the juvenile detention system. The credibility of juvenile criminal procedure is undermined by judicial failure to assume the responsibilities imposed by the Constitution. By begging the question before it, the court has demonstrated its willingness to sacrifice justice to order and convenience.

A further reason why retroactivity would not serve the purpose underlying the right to counsel was that tangible evidence would be lost or destroyed, and witnesses' memories dimmed, resulting in "slight chance that a new hearing, even with the assistance of counsel, would result in more accurate findings of fact or more appropriate dispositional orders."[45] The issue, however, is not whether a rehearing will improve the accuracy of a former factual determination, but whether the original findings were sufficient to overcome the strong presumption of innocence. Even without regard to the accuracy of later findings, one may question the propriety of denying an individual his constitutional rights because of events beyond his control.

Concluding that retroactive application of the right to counsel guarantee would not serve the purpose underlying the rule, the *Brumley* court turned to an examination of the second factor in the formula, "reliance placed upon pre-*Gault* procedures by law enforcement, administrative, social and judicial agencies."[46] The court stated that "it is difficult to envision a case wherein the extent of past reliance on a presently discarded rule could be greater or more widespread,"[47] and that such reliance was "fully justified by the dearth of judicial pronouncements to the contrary."[48] In view of the pronouncements of the United States Supreme Court, however, such an assertion is

45. *Id.*
46. *Id.* at 709, 466 P.2d at 485.
47. *Id.*, 466 P.2d at 484-85.
48. *Id.*, 466 P.2d at 485.

unwarranted. As early as 1948, in *Haley v. Ohio,* the court stated that[49]

> the fact that he had no friend or counsel to advise him [is something] the law should not sanction. Neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law.

In *Kent v. United States,* [50] another pre-*Gault* decision, the Court held: [51]

> The right to representation by counsel is not a formality. It is not a grudging gesture to a ritualistic requirement. It is the essence of justice.

Thus, the *Brumley* court's justification for agency reliance serves only to weaken its position.

Finally, the Brumley court considered the third factor in the retroactivity equation, the effect of retroactive application of *Gault* upon the "administration of justice."[52] Envisioning the reprocessing of "literally thousands" of pre-*Gault* delinquency determinations, the court reasoned that such reconsideration would be "devastating," would "serve no useful purpose," and would "unwisely burden" court calendars.[53] Considering, however, the far-reaching effect of the retroactive application of *Gideon v. Wainwright, Gault*'s retroactivity should create comparatively minor difficulties in reprocessing.[54] Regardless of the difficulty, individual rights should never be subordinated to judicial convenience.

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49. 332 U.S. 596, 600-01 (1948).
50. 383 U.S. 541 (1966). *See* note 10 and accompanying text, *supra.*
51. *Id.* at 554, 561.
52. 77 Wn.2d at 709, 466 P.2d at 485.
53. *Id.* at 709-10, 466 P.2d at 485.
54. On August 31, 1970, 303 juveniles who had been committed prior to *Gault* were still under the supervision of the Office of Juvenile Rehabilitation in Washington State. Of these, 71 were incarcerated and 255 were on parole. Letter from Cameron R. Dightman, Research Investigator, Washington Division of Institutions, to the *Washington Law Review,* November 4, 1970.

The Washington Court has not taken a position concerning whether probation or the collateral consequences attached to a finding of guilt constitutes sufficient "custody" to serve as the basis for federal habeas relief. *See* Benson v. California, 328 F.2d 159, 162 (9th Cir. 1964).

It is also possible that the Washington Court would permit an unconstitutionally convicted person to utilize other procedures to expunge the records of his conviction. Possible procedures are the writ of *coram nobis* or a declaratory judgment proceeding. Assuming that these remedies were made available, the total impact of *Brumley* would not be limited to a quantum of 303 cases. Whether such remedies are available is far

Gault's extension of procedural due process rights to juveniles appears doomed to prospective application in Washington. Similarly doomed is *In re Winship*.[55]

Juveniles such as Miss Brumley who were unfortunate enough to have been incarcerated prior to *Gault* will be denied a right guaranteed by the Constitution. Despite practical arguments for and against retroactivity, the United States Supreme Court has consistently held that where the accuracy of a determination of guilt or innocence is enhanced by a constitutional guarantee, due process requires retroactive invocation of that right, regardless of the passage of time. The right to counsel is such a guarantee—a requirement necessary to help avoid the incarceration of innocent children.

from clear. *See*, e.g., Eddy v. Moore, 5 Wn. App. 334, 487 P2d 211 (1971) (Requiring the government return fingerprints and photographs to acquitted person); Sibron v. New York, 392 U.S. 41 (1968) (conviction challenge allowed by person who had served sentence).

55. *See* text accompanying note 18, *supra*.